

Protest of)	
)	Date: August 10, 1990
JACK L. VANDERGRIFF)	
)	
Solicitation No. 380-76-90)	P.S. Protest No. 90-37

DECISION

Mr. Jack L. Vandergriff protests the determination of the contracting officer at the Memphis Transportation Management Service Center (TMSC), that he is a nonresponsible prospective contractor under Solicitation No. 380-76-90 for highway transportation service between Johnson City and Falls Branch, TN. Mr. Vandergriff was the low bidder.

Bids were received under the solicitation on June 4, 1990. By letter dated June 27, Mr. Vandergriff was advised that his bid had been rejected because of "your past performance on other routes." Thereafter, award was made to the second low bidder, Lynn Dombey.^{1/} Mr. Vandergriff's protest, dated June 30, was received by the TMSC on July 3. The protest states no grounds, asserting only Mr. Vandergriff's "appeal" of the decision not to award him the contract.

The contracting officer has furnished his report to this office, noting that his finding of nonresponsibility resulted from Mr. Vandergriff's past unsatisfactory performance on Highway Contract Route (HCR) 37837, Knoxville to Gatlinburg, TN, which resulted in the termination of that contract for default effective June 1, 1990.

Mr. Vandergriff has provided comments in response to the contracting officer's report. Those comments reflect Mr. Vandergriff's view that the termination of HCR 37837 was "arbitrary and without merit," a view which Mr. Vandergriff asserts he will express in appealing the termination. He further asserts that he holds two other highway contracts, HCR 37833 and HCR 37811, on which he describes his continuing service as satisfactory. In addition, he complains of various irregularities regarding the rejection of his bid:

^{1/}The copy of Mr. Dombey's contract furnished by the contracting officer indicates that it was accepted by the contracting officer on Monday, July 2. The contracting officer's statement avers that the contract was awarded effective July 1. We need not resolve this discrepancy.

1. He did not receive the abstract of bids until fourteen days after bids were opened.
2. He received the June 27 letter informing him of the rejection of his bid on June 30, although Mr. Vandergriff is within the two-day delivery area of the TMSC.
3. The award to the second low bidder on July 2, immediately following the mailing of Mr. Vandergriff's protest on July 1, was a deliberate attempt to evade the requirements of Procurement Manual (PM) 4.5.^{1/}

There is a procedural problem with Mr. Vandergriff's protest. Our protest regulation, PM 4.5.3, states that

[a protest] must ... set forth a complete statement of the alleged defects or grounds that make the solicitation terms or the award or proposed award defective. Mere statement of intent to file a protest is not a protest.

Issues not raised in an initial protest but presented thereafter in the course of a protest may be considered only if they are themselves timely; their timeliness does not relate back to the initial protest. Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986. To be timely, an issue must be presented within ten working days of the time when it was known or should have been known, but in no event more than fifteen working days after the date of contract award. PM 4.5.4 d. Here, all of the substantive grounds of Mr. Vandergriff's protest were first set out in comments on the contracting officer's report which were received by this office on August 1, far more than fifteen days after contract award. Accordingly, we must conclude that the protest is untimely.

We comment briefly, however, on the central point of the protest.

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. ... [W]e will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

^{2/}PM 4.5 includes all of the regulations governing bid protests. We presume that Mr. Vandergriff's concern is with 4.5.5 a, which provides, in pertinent part, as follows:

When a timely protest has been filed with either the contracting officer or the General Counsel before contract award, award may not be made until the matter has been resolved, unless the responsible APMG, after consulting with counsel, determines that the Postal Service will be seriously injured, financially or otherwise, by delaying award until the protest has been resolved, and that the award should be made without awaiting the decision.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981.

PM Section 3.3.1 a. sets forth general standards for determining whether a prospective contractor is responsible. To be determined responsible, a contractor must have a good performance record (PM 3.3.1 b.3.). The contracting officer's determination of nonresponsibility was not arbitrary and capricious. Recent unsatisfactory contract performance, evidenced by a default termination, can justify a determination of nonresponsibility. Package Express, Inc., P.S. Protest Nos. 87-57, 87-58, 87-64, July 27, 1987; Hunter L. Todd, P.S. Protest No. 85-78, October 18, 1985; Bathey Manufacturing Company, P.S. Protest No. 82-7, March 31, 1982. The fact that a contractor is challenging or plans to challenge a termination does not preclude consideration of the termination in determining responsibility. DWS, Inc., P.S. Protest No. 87-100, November 6, 1987. Further, a contractor's successful performance of other contracts does not demonstrate the unreasonableness of the contracting officer's determination. The Aeronetics Division of AAR Brooks & Perkins, Comp. Gen. Dec. B-222516; B-222791, August 5, 1986, 86-2 CPD & 151.

The protest is dismissed.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/7/93]